Supreme Court, U.S.
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No. 95-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SANDRA K. HUGHES,

Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; JAMES D. BOWSER, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

Questions Presented

I. When presented with a prima facie case of sex discrimination and a prima facie case of First Amendment retaliatory discharge, may a public employer defendant meet its burden to articulate a legitimate, non-discriminatory reason(s) for its disparate disciplinary treatment and discharge of a plaintiff solely by the appellate argument of its counsel where the record does not contain any admissible evidence in which the employer sets forth the alleged non-discriminatory reason(s) for that disparate treatment?

II. Does a public employee and female plaintiff have a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983 against a local governmental employer for employment discrimination on the basis of sex that is independent of any remedies or rights that may exist under Title VII of the Civil Rights Act of 1964?

III. Is there any material difference between the standard of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of 42 U.S.C. §2000e-3(a) of the Civil Rights Act of 1964, and the burden of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of the First Amendment?

IV. With respect to claims of sex discrimination and First Amendment retaliatory discharge, may a public employee and female plaintiff meet her burden to demonstrate a genuine issue of material fact as to her employer's retaliatory and discriminatory intent with respect to her discharge by production of evidence of disparate disciplinary treatment for which her employer did not articulate any legitimate, non-discriminatory reason(s) that was submitted as admissible evidence in the record of the case?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SANDRA K. HUGHES,
Petitioner,

v.

MORRIS BEDSOLE,
both individually and in his official capacity as
Sheriff of Cumberland County, North Carolina;
JAMES D. BOWSER,
both individually and in his official capacity as
Major of the Cumberland County Sheriff's Department;
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,
CUMBERLAND COUNTY, NORTH CAROLINA,
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WESTERN SURETY COMPANY, INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Sandra K. Hughes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled proceeding on April 10, 1995. OPINIONS *BELOW*

The opinion of the Court of Appeals for the Fourth Circuit is reported at 48 F.3d 1376 and is reprinted in the Appendix

hereto, App. at p. 1A, *infra*. The April 10, 1995 order of the Court of Appeals for the Fourth Circuit denying the petitioner's petition for rehearing and suggestion for rehearing in banc is also reprinted in the Appendix hereto, App. at p. 25A, *infra*.

The opinion of the United States District Court for the Eastern District of North Carolina is reprinted in the Appendix hereto, App. at p. 27A, *infra*. The January 31, 1994 order of the United States District Court for the Eastern District of North Carolina denying the petitioner's motion to amend judgment is also reprinted in the Appendix hereto, App. at p. 46A, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fourth Circuit was issued on March 15, 1995. The petitioner's timely motion for rehearing and suggestion for rehearing in banc was denied on April 10, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny any person within its jurisdiction the equal protection of the laws 42 U.S.C. §1983:

Every person, who, under color of any statute, ordinance, regulation,, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §2000e-2(a)(1):

Employers. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

42 U.S.C. §2000e-3(a):

Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training pro-

grams, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. §§2000e-5(f)(1) and (3):

Civil Action by Commission, Attorney General, or person aggrieved.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, government agency, or political subdivision, named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.

If the charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil

action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance. . . . .

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such

district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Article I, §14, North Carolina Constitution:

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C.Gen.Stat. §143-422.2:

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees. It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely effects the interests of employees, employers, and the public in general.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner filed this action on December 12, 1991 against Morris Bedsole, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina, James D. Bowser, both individually and in his official capacity as a Major

of the Cumberland County Sheriff's Department ("CCSD"), Cumberland County, North Carolina, and the Western Surety Company, Inc. In her complaint, the petitioner sought damages, injunctive and declaratory relief arising out of her March 27, 1989 discharge. In pertinent part, that complaint was based upon the petitioner's allegations that her discharge had been based upon her sex and in retaliation of her exercise of her First Amendment right to free speech. Federal jurisdiction was based upon 28 U.S.C. §§1331 and 1367(a).

The defendants moved for summary judgment on all claims on September 16, 1993. That motion was not based upon a claim(s) that the factual evidence with respect to sex discrimination and free speech retaliation did not indicate a genuine issue of material fact for the jury. Rather, with respect to those claims, all defendants relied upon certain legal arguments concerning the existence of certain causes of action, and the county defendant's position that, as a matter of law, it could not be held liable for the personnel decisions of the county sheriff regardless of whether any unlawful discrimination had occurred. On January 4, 1994, the Honorable Franklin T. Dupree, Jr., U.S. District Judge, issued a decision and order granting the defendants' motion for summary judgment. By order filed on January 31, 1994, Judge Dupree denied the petitioner's timely motion under Rule 59(e) to alter or amend the judgment.

Hughes appealed and the United States Court of Appeals for the Fourth Circuit affirmed on March 15, 1995 on grounds other than those upon which the district court had relied with respect to the petitioner's claims of sex discrimination and retaliatory discharge in violation of her free speech rights under the United States and North Carolina Constitutions. App. at pp. 14A n.7, and 14A-22A. The petitioner's timely motion for rehearing and suggestion for rehearing in banc was denied on April 10, 1995.

B. FACTS

Hughes began her employment with the CCSD in 1976. Her first assignment was to the position of matron in the Cumberland County Jail. Thereafter, Hughes became a road patrol officer for approximately 3 1/2 years. While working on the road patrol, Hughes was involved in an accident, and injured her right arm while working. Hughes was treated for this injury, reached maximum medical improvement, and returned full-time to her road patrol position for approximately one year. That accident left her with a permanent injury to her arm diagnosed as "persistent lateral epicondylitis". That permanent injury restricted the type of work that Hughes could perform, but it did not prevent her from performing the essential functions of a Road Patrol Officer with the CCSD.

In March, 1988, Hughes was promoted, and became the first female sergeant and shift supervisor in the history of the Cumberland County Jail. With that promotion, Hughes was also given responsibility for supervising one of the five platoons that staffed the Cumberland County Jail. Before March 16, 1989 in the month of March, Hughes met with Reverend Norman Mitchell (hereinafter referred to as "Mitchell"), the Chaplain of the Jail, and an employee of the CCSD. That meeting took place outside the established channels of command with the CCSD. For all of 1989, that chain of command was headed in the Jail by then Chief Jailer James Bowser. According to the record testimony of John Tyndall, the former Assistant Chief Jailer of the CCSD for about eight years and an officer in the CCSD Jail transportation unit at the time of his testimony, going outside the chain of command in March, 1989 was a violation of the responsibilities that Hughes had as a supervisor at the Jail. However, there was also evidence in the record that Bedsole had an "Open Door" policy which authorized such departures from the chain of command.

In the course of that meeting, Hughes expressed some concerns to Mitchell regarding understaffing in the CCSD, and

the threat that this understaffing posed for the safety of the persons employed or housed in that Jail. Those same concerns were shared by at least one other experienced Deputy Sheriff of the CCSD. Those concerns were also preceded by the appellant's experience with a near riot in the Jail, and an escape of several inmates from the Jail. Hughes also arranged for other employees of the Jail to meet or speak with Mitchell to express similar concerns at or around the March, 1989 date of petitioner's meeting with Mitchell. At some point also before March 16, 1989, Hughes met with Mitchell and Bedsole about these same concerns.

Shortly after that meeting with Bedsole, Hughes was suspended for three days without pay by Major Bowser and Sheriff Bedsole because of an incident in which some member of the Jail Ministry equipped with keys to the cellblocks and catwalks in the Jail left a catwalk door open at the Jail at the end of Hughes's shift at the Jail on March 16, 1989. After an investigation of this incident, Hughes accepted responsibility for the incident because it had happened on her shift, and she was not able at that time to determine which, if any, CCSD employee had left the catwalk doors unlocked.

Then on March 27, 1989, Hughes was discharged by Bedsole on the recommendation of Bowser for another incident on March 24, 1989 when an employee of the Jail left another door unlocked at the Jail. Hughes did not accept responsibility for this incident in any evidence presented to the lower courts. In 1989, Bedsole was interviewed by an EEOC investigator concerning, in part, why some lesser form of disciplinary action for Hughes short of discharge was not considered after the second unlocked door was discovered by Major Bowser on the petitioner's shift on March 24, 1989. According to the EEOC investigator, Bedsole explained to the EEOC that Hughes "was not demoted because [he] could not put her back on the road (a lot of injuries)."

No shift supervisor and sergeant other than Hughes has ever been fired or ever suffered a three day suspension for any other

incident in which an employee of the Jail left a door unlocked in the Jail during the shift supervised by that sergeant. In August, 1988, one female acting platoon leader (Marsha Hutchinson) who did not hold the rank of Sergeant at that time did receive 30 days of probation and a written reprimand for personally leaving doors unlocked in a single incident that occurred in August, 1988. The defendants presented testimony over the petitioner's objection that this same female officer may have presented some "concerns" to Sheriff Bedsole at some unspecified time when she did not hold the rank of Sergeant. At least one male shift sergeant (Leroy Park) who had not voiced any concerns to any person about the security problems in the Jail did not suffer any disciplinary action which resulted in any loss of pay even though he had been the shift sergeant with responsibility over the Cumberland County Jail in at least two other incidents on July 19 and 30, 1989 in which employees of the Jail left a door unlocked in the Jail.

The "CCSD records and Bedsole's later statement to an EEOC investigator do not explain why the male sergeant was not disciplined for the July incidents." App. at p. 15A. Those same CCSD records and Bedsole's later statement to the EEOC also do not contain any explanation for the decision to discharge Hughes based upon the second unlocked door incident on March 24, 1989. In addition, the defendants did not place any evidence in the record of this case in which Sheriff Bedsole provided any explanation or reason for the disparate treatment of Hughes and Sergeant Park in connection with the two incidents in March, 1989 which involved Hughes, and the two incidents in July, 1989 which involved Park. However, the record did indicate the reasons that Bedsole offered to the EEOC for its disciplinary action against Hughes on March 16, 1989. Those three reasons from the EEOC investigator's interview notes were: "1. she was in charge 2. she probably neglected to lock them 3. she should have discovered the doors unlocked". The EEOC interview notes also indicated that Bedsole told the EEOC that Sergeant Park was not disciplined for an incident

in the Jail that occurred in February, 1989 when a door was left unlocked because it could not be determined who left the doors unlocked.

C. DISTRICT COURT OPINION BELOW

The District Court framed the sex discrimination and First Amendment retaliatory discharge issues as follows:

1) Did Sheriff Bedsole, in his official capacity as Sheriff of Cumberland County, have "final policymaking authority" for Cumberland County under 42 U.S.C. §1983 with respect to the discipline of employees of the Cumberland County Sheriff's Department?

2) Did the petitioner's actions and speech to Sheriff Bedsole and Chaplain Mitchell constitute matters of "public concern" under the First Amendment or Article I, §14, of the North Carolina Constitution?

3) Was the evidence of record sufficient to allow a reasonable jury to find that the plaintiff was discharged because she was a woman?

The District Court answered each of these three questions in the negative. App. at pp. 35A-42A. The District Court concluded as a matter of law that because North Carolina state law expressly indicated that Cumberland County had no role in the hiring and firing of the Sheriff's employees, Sheriff Bedsole in his official capacity did not have "final policymaking authority" for Cumberland County with respect to CCSD personnel decisions. App. at pp. 35A-37A. The District Court then determined as a matter of law that the matters that Hughes raised with Sheriff Bedsole and Chaplain Mitchell were not of "public concern" under the First Amendment and Article I, §14, of the North Carolina Constitution. App. at pp. 38A-41A. Lastly, after a single-sentence review of the evidence, the District Court decided in that same sentence that there was no evidence in the record from which a reasonable jury could find that the plaintiff was discharged because she was a woman. App. at p.

41A - 42A. The petitioner filed a timely motion under Rule 59(e) to amend this final judgment of the District Court based upon certain additional evidence relevant to the factual issue of discrimination that had not been previously submitted to the District Court due to the defendants' failure to raise any factual issue in their original motion for summary judgment which in any way related to that factual issue. App. at p. 6A. That motion was denied. App. at p. 46A.

D. FOURTH CIRCUIT OPINION BELOW

The Fourth Circuit opinion decided the petitioner's appeal on the three above issues decided by the District Court on grounds or evidence other than that which was relied upon by the District Court. App. pp 14A-22A. The Fourth Circuit expressly considered all of the evidence offered by the petitioner to the District Court on the issues of sex discrimination and retaliation in violation of the First Amendment and Article I, §14, of the North Carolina Constitution. App. at p. 14A n.7. After consideration of that evidence, the Fourth Circuit determined that the petitioner had demonstrated a prima facie case of sex discrimination. *Hughes v. Bedsole*, App. at p. 14A.

However, the Fourth Circuit affirmed the District Court's rejection of the petitioner's sex discrimination claims under 42 U.S.C. §1983 and the Fourteenth Amendment, and N.C.Gen. Stat. §143-422.2. That affirmation was based in part upon its view that Hughes did not have a cause of action for sex discrimination under 42 U.S.C. §1983 and the Fourteenth Amendment that was independent of any cause of action under 42 U.S.C. §2000e-5(f)(1) of Title VII of the Civil Rights Act of 1964. App. pp. 11A-12A n.6. It was also based upon its view that the evidence that Hughes had submitted was insufficient to establish a genuine issue of material fact regarding whether the reasons offered by the respondents' counsel in oral and written argument before the Fourth Circuit to rebut the petitioner's prima facie case were pretext. App. at pp. 12A - 16A, and esp.

p. 15A at n.8. That argument by defendants' counsel before the Fourth Circuit was relied upon by the Fourth Circuit to rebut the petitioner's prima facie case despite the petitioner's argument at pages 28-30 of her opening brief to the Fourth Circuit, pages 11-12 of her reply brief, and in oral argument before the Fourth Circuit that "there is simply no evidence in the record" that explains or purports to explain the disparate treatment afforded Hughes and Sergeant Leroy Park.

The Fourth Circuit also affirmed the District Court's rejection of the petitioner's free speech claims. That rejection was based at least in part upon its view that there was a material difference between the nature and application of the burden of proof in a retaliatory discharge case under 42 U.S.C. §2000e-3(a) of Title VII of the Civil Rights Act of 1964 and a retaliatory discharge case under the First Amendment and 42 U.S.C. §1983. 48 F.3d at 1387; App. pp. 20A-21A. Based upon its determination as to the nature of the petitioner's burden of proof in a free speech context and its consideration of the reasons advanced by respondents' counsel in oral and written argument before the Fourth Circuit as to the reasons for the disparate disciplinary treatment suffered by Hughes, the Fourth Circuit determined that the petitioner had not set forth specific facts raising a genuine issue of material fact regarding whether her speech was a substantial or motivating factor behind her discharge. *Hughes v. Bedsole*, 48 F.3d at 1384-88. Again, the Fourth Circuit considered and relied upon the oral and written arguments of defendants' counsel on this free speech causation issue despite the oral and written arguments of plaintiff's counsel to the contrary at page 37-40 of her opening brief to the Fourth Circuit, and pages 10-13 of her reply brief to the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH THE PRIOR DECISION OF THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, 450 U.S. 248, 255 (1981), AND NUMEROUS OTHER CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT A DEFENDANT CANNOT MEET ITS BURDEN TO REBUT THE PLAINTIFF'S PRIMA FACIE PROOF OF DISCRIMINATION OR RETALIATION BY AN EXPLANATION OR ARTICULATION THAT IS NOT ADMITTED INTO EVIDENCE

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)(hereinafter "*Burdine*"), this Court held that after a plaintiff in an employment discrimination case produces evidence sufficient to establish a prima facie case, the burden then shifts to the defendant of "producing evidence" of some "legitimate, non- discriminatory reason" for the disparate treatment evidence offered by the plaintiff. The Court went on to say that:

> "[t]o accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant."

Id., 450 U.S. at 255 (footnote omitted). In footnote 9 at page 255 of that same decision, the Court explained the first sentence that appears in the text that is quoted above from page 255 as follows:

> "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or *by argument of counsel.*"

Id., 450 U.S. at 255 n.9 (emphasis added).

The rules of law and proof allocation in employment dis-

crimination cases has been adopted and applied by numerous federal courts of appeal. *Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1233 (11th Cir. 1985); *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1429 (5th Cir. 1984), *cert. denied*, 474 U.S. 1054 (1986); *Miller v. WFLI Radio, Inc.*, 687 F.2d 136, 138 (6th Cir. 1982); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981). For example, in *IMPACT v. Firestone*, 893 F.2d 1189, 1193-94 (11th Cir. 1990), the Eleventh Circuit specifically followed and applied the language quoted above from *Burdine*, and rejected a district court opinion that relied upon the contentions of defendant's counsel and the district court's articulation and explanation of the disparate treatment evidence in that case because the defendants did not:

> "... offer proof by any person who made the employment decision, or by any other person, stating the decision was made on the basis of what he or she thought demonstrated the best qualified person."

IMPACT v. Firestone, *supra*, 893 F.2d at 1194. This same rule of law has also been adopted by a number of federal circuit courts of appeal in First Amendment retaliatory discharge cases with respect to the plaintiff's burden to prove causation. See *Tao v. Freeh*, 27 F.3d 635, 641 (D.C.Cir. 1994). In *Tao v. Freeh*, *supra*, the D.C. Circuit noted that the "... appellees presented *evidence* [in rebuttal of the plaintiff's disparate treatment evidence] that the decision to allow Chang and Lau to be re-evaluated on their original applications was based on the fact that Chang and Lau had only accuracy problems and were otherwise qualified for promotion." *Tao v. Freeh*, 27 F.3d at 641 (emphasis added).

In this case, the Fourth Circuit's decision recognized that the "CCSD records and [Sheriff] Bedsole's later statement to the EEOC investigator do not explain why the male sergeant [Leroy Park] was not disciplined for the July incidents." 48 F.3d at 1385; App. at p. 15A. That observation should have resulted in a determination that the petitioner had produced

sufficient evidence to require a jury trial on her employment discrimination and retaliatory discharge claims. *Burdine*, 450 U.S. at 255 n.9; *Nanty v. Barrows Co., supra*, 660 F.2d at 1332. Nevertheless, the Fourth Circuit specifically relied upon the *contentions of defendants' counsel* in appellate oral argument and briefing to that court as the articulation and explanation required by *Burdine* for that disparate treatment and "apparent discrepancy". 48 F.3d at 1385; App. at p. 15A at n.8 (specifically citing oral argument as apparent source of *Burdine* explanation, and relying upon what "appellees maintain" with respect to "this apparent discrepancy").

If the Fourth Circuit's application of *Burdine* in this case is allowed to stand, it will essentially vitiate the force of the *Burdine* decision for all district courts within the Fourth Circuit's jurisdiction. Employers will no longer be required to produce admissible evidence of the actual and legitimate reason(s) for any employment decision that is the subject of an employment discrimination action in which the employee has established a prima facie case. Instead, employers will be free to cobble together some *post hoc* reason(s) for the disparate treatment of their employees or job applicants through the advocacy of their attorneys in oral arguments before district and appellate courts. This occurrence will contribute to increased discrimination in all forms of private and public employment. The petitioner submits that this result "... foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely effects the interests of employees, employers, and the public in general." N.C.Gen.Stat. §143-422.2.

II. THE OPINION BELOW CONFLICTS WITH MANY CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT EMPLOYEES OF LOCAL GOVERNMENT HAVE A CAUSE OF ACTION FOR RACE OR SEX DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983

THAT IS INDEPENDENT OF ANY CAUSE OF ACTION FOR THAT SAME EMPLOYMENT DISCRIMINATION UNDER 42 U.S.C. §§2000e-5(f)(1) and (3)

The Fourth Circuit's opinion in this case rejected the petitioner's sex discrimination in part because of its determination of law that "Hughes cannot bring an action under §1983 for violation of her Fourteenth Amendment rights because Hughes originally could have instituted a Title VII action." 48 F.3d at 1376; App. at p. 11A at n.6. This holding conflicts with a large number of federal circuit decisions which heretofore were unanimous in the conclusion that an employee of a local governmental entity had a cause of action under 42 U.S.C. §1983 and the Fourteenth Amendment for employment discrimination on the basis of sex or race that was entirely independent of any possible claim under Title VII of the Civil Rights Act of 1964. *Annis v. County of Westchester*, 36 F.3d 251, 255 (2nd Cir. 1994); *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1079 (3d Cir. 1990); *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989); *Roberts v. College of the Desert*, 870 F.2d 1411, 1415-16 (9th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952, 956-63 (4th Cir. 1987); *Trigg v. Wayne County Community Schools*, 766 F.2d 299, 302 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1205 (5th Cir. 1984). This conflict between the decision in this case and the decision on this same issue by many other federal circuit court decisions needs resolution.

Based upon the legislative history reviewed in the Fourth Circuit's 1987 opinion in *Keller v. Prince George's County, supra*, 827 F.2d at 956-63, and for the reasons set forth in that opinion and those other federal circuit court opinions that are cited above, the petitioner submits that the public interest

against sex discrimination in employment would be served if this Court granted a writ of certiorari in this case, and summarily reversed, vacated, and remanded this action for trial on the sex discrimination and retaliatory discharge claims of the petitioner. If the writ did grant, then there would be no conflict between the various federal circuit court opinions on this issue, and the public interest in providing a full and complete remedy for any form of illegal employment discrimination would be vindicated.

III. THE OPINION BELOW CONFLICTS WITH THE OPINION OF THIS COURT IN *PRICE, WATERHOUSE v. HOPKINS*, 490 U.S. 228, 248-49 (1989), AND AT LEAST ONE CIRCUIT COURT DECISION WHICH HAS HELD THAT THERE IS NO MATERIAL DIFFERENCE BETWEEN THE STANDARD OF PROOF AND ALLOCATION OF PROOF THAT A PUBLIC EMPLOYEE MUST MEET TO DEMONSTRATE A PRIMA FACIE CASE OF RETALIATORY DISCHARGE IN VIOLATION OF 42 U.S.C. §2000e-3(a) OF THE CIVIL RIGHTS ACT OF 1964 AND THE BURDEN OF PROOF THAT A PUBLIC EMPLOYEE MUST MEET TO DEMONSTRATE A PRIMA FACIE CASE OF RETALIATORY DISCHARGE IN VIOLATION OF THE FIRST AMENDMENT

In 1989, this Court drew a close analogy between the burdens of proof in the Title VII gender discrimination case at hand and those involved in a First Amendment public employee retaliatory discharge case such as *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)(hereinafter "*Mt. Healthy*"). *Price, Waterhouse v. Hopkins*, 490 U.S. 228, 248-49 (1989). In so doing, this Court stated that:

> "[a] court that finds for a plaintiff under this standard [requiring proof by a defendant employer that it would

have fired the plaintiff even in the absence of protected conduct] has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision." *Id.*, 490 U.S. at 249.

This close analogy between the burdens of proof in Title VII cases and First Amendment retaliatory discharge cases has been adopted and applied by other federal courts of appeal with the premise that the "causation inquiry" for First Amendment retaliatory discharge claims requires that "essentially the same inquiry" be applied as that which is used in Title VII discrimination claims. *Pierce v. Texas Department of Criminal Justice*, 37 F.3d 1146, 1151 (5th Cir. 1994). See also *Tao v. Freeh*, *supra*, 27 F.3d at 641. Based upon that understanding, a number of federal circuit courts of appeal have recognized that there is no material difference between the nature and type of proof that will satisfy the plaintiff's burden under 42 U.S.C. §2000e-3(a) to demonstrate that "a causal connection existed between the protected activity and the adverse action" and the plaintiff's burden under the First Amendment and 42 U.S.C. §1983 to demonstrate that his or her protected free speech activities were the "substantial" or "motivating factor" in the adverse employment decision. Thus, a plaintiff may meet his burden under 42 U.S.C. §2000e-3(a) to demonstrate prima facie proof of a "causal connection" between the plaintiff's discharge and his or her protected activity through indirect evidence of disparate treatment of fellow employees who did not engage in any protected activity. *De Cintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2nd Cir.), *cert. denied*, 484 U.S. 965 (1987). Similarly, a plaintiff may meet his burden to show that the plaintiff's protected free speech activity was a "substantial" or "motivating factor" in the adverse employment decision by production of indirect evidence of disparate treatment of fellow employees who did not engage in any protected speech activity. *Tao v. Freeh*, *supra*, 27 F.3d at 641; *Mt. Healthy*, *supra*, 429 U.S. at 287.

In contrast, the Fourth Circuit panel in this case based its

rejection of the petitioner's free speech claims based in significant part on its perception that the "different standard" of proof for claims of retaliation under 42 U.S.C. §2000e-3(a) and the First Amendment made a material difference in the nature and amount of proof required to allow a First Amendment claim to go to the jury. 48 F.3d at 1387-88; App. at pp. 20A-21A. The perception resulted in the Fourth Circuit's conclusion that the petitioner could not satisfy her burden to show a jury issue with respect to the question of causation on her First Amendment claim based upon the:

> "... basic facts of the temporal connection and the male sergeant's receipt of no punishment after two similar security violations . . .".

48 F.3d at 1388; App. at p. 22A. Again, as noted in Part I above of the Reasons for Granting the Writ section of this petition, the Fourth Circuit considered the reasons advanced by defendants' counsel in oral argument and briefing to the Fourth Circuit with respect to the defendants' disparate treatment of the plaintiff and that "male sergeant" even though none of those reasons were submitted as evidence in the record from the decisionmakers involved. *Id.* ("Considering Appellees' legitimate, nondiscriminatory reasons and the absence of any evidence of animus by Bedsole on account of Hughes' free speech . . .").

The petitioner submits that the issue of the identity or disparity between the respective burdens of proof and the order of that proof in the Title VII retaliation context and the First Amendment free speech public employee context is an extremely important issue for the thousands of public employees in this country. Because of the conflict between the Fourth Circuit opinion in this case, this Court's decision in *Price, Waterhouse v. Hopkins*, *supra*, and the decisions of other federal circuit courts of appeal on this issue, the petitioner believes that the Court should accept this issue for review by certiorari to resolve a number of substantial questions that are raised by this case, including, *inter alia*, whether it is permissible to use oral argument of counsel or other inadmis-

sible evidence to rebut a prima facie case of causation in a First Amendment retaliatory discharge public employee case when this Court's opinion in *Burdine* indicates that it is clearly impermissible in the Title VII context.

IV. THE OPINION BELOW CONFLICTS WITH AT LEAST ONE OTHER CIRCUIT COURT DECISION WHICH HAS HELD THAT AN EMPLOYEE CAN MEET HER BURDEN TO ESTABLISH A GENUINE ISSUE FOR TRIAL ON A CLAIM OF RETALIATION UNDER THE FIRST AMENDMENT BY PRODUCTION OF EVIDENCE THAT DEMONSTRATES DISPARATE TREATMENT PROXIMATE IN TIME TO THE FREE SPEECH WHERE NO EXPLANATION OR ARTICULATION OF THAT DISPARATE TREATMENT IS ADMITTED INTO EVIDENCE

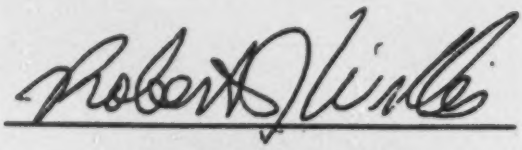
The Fourth Circuit's opinion in this case held that the plaintiff's evidence of a temporal connection between the date of her discharge and the date of her protected free speech activity, and the male sergeant's receipt of no punishment after two similar security violations did not create a jury issue. 48 F.3d at 1388; App. at p. 22A. This opinion directly conflicts with the recent opinion of the U.S. Court of Appeals for the District of Columbia in which that federal circuit court held that evidence of an employer's disparate treatment of an employee who had engaged in protected free speech activity was sufficient to warrant a jury trial. *Tao v. Freeh, supra*, 27 F.3d at 641. In *Tao v. Freeh, supra*, the plaintiff delivered a letter to the head of the FBI (her employer) in which she charged that she and many other Chinese-American employees of the FBI were the victims of race discrimination. *Tao v. Freeh*, 27 F.3d at 640. In support of her claim that she was denied a promotion in retaliation for that letter, she presented evidence that her employer refused to re-evaluate her application for promotion by showing " . . . that other similarly situated employees

who made no claims of discrimination were re-evaluated." *Tao v. Freeh*, 27 F.3d at 641.

The manner and order of proof in free speech, public employee retaliatory discharge cases is an issue of great public importance. Without the public's access to the information and knowledge that the thousands of public employees in this country have with respect to the actions and intentions of their governmental employers, all residents of this country would suffer. The petitioner submits that the direct conflict between the decision of the D.C. Circuit in *Tao v. Freeh*, *supra*, and the opinion in this case on the nature and type of evidence that will be considered as sufficient to warrant a jury trial in a public employee free speech case is sufficient alone to warrant the granting of the writ requested by the petitioner. This is even more the case when one considers the thousands of public employees and millions of residents in this country who benefit or would benefit from the information and knowledge available from public employees who may be empowered by the requested clarification of this conflict in the law to engage in a full and free exercise of their First Amendment right to free speech on matters of public concern.

CONCLUSION

This case presents the Court with an opportunity for resolving important statutory and constitutional issues relating to the type, order, and nature of the proof that is required to rebut a prima facie claim of employment discrimination claim under 42 U.S.C. §§2000e-2(a)(1), 2000e-3(a), 42 U.S.C. §1983, and the First and Fourteenth Amendments, and their relationship to the type, order, and nature of the proof required to demonstrate and rebut a prima facie claim of free speech, public employee employment retaliation. This case also presents the Court with an opportunity to determine whether a female employee of a local governmental employer has a cause of action under 42 U.S.C. §1983 and the Fourteenth Amendment for sex discrimination in that employment that is independent of any cause of action that she may have under Title VII of the Civil Rights Act of 1964.



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